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IN THE

Supreme Court of the United States

October Term, 1968

No. 1029

JOHN J. DELURY, Individually and as President, JOHN J. CONROY, Individually and as Treasurer, etc., of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, ETC.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellants petition this Court to grant them special leave to file this petition for rehearing of this cause after expiration of the 25-day period following this Court's order of April 1, 1969, which dismissed their appeal; and, in support of their petition, the appellants respectfully show:

Grounds for Rehearing

On April 1, 1969, this Court dismissed the appeal of the appellants herein "for want of a properly presented federal question".

Since "federal question[s]" are directly involved in the appeal, i.e. due process and equal protection, it would appear that this Court dismissed the appeal upon the ground that they were not "properly presented".

However, the record would seem to lend no support for such a conclusion. For, as appears from the Jurisdictional Statement, questions of due process and equal protection were directly presented and the opinion of the New York Court of Appeals affirming the conviction, review of which is sought here, dealt at length with those constitutional questions and, in addition, incorporated by reference the opinion of that Court in another case (*Rankin* v. *Shanker*, 23 N.Y. 2d 111) which dealt at length with those constitutional questions, and the concurring memorandum of three of the Judges of the New York Court of Appeals in the present case specifically stated that their concurrence was founded "on constraint of this court's decision in *Rankin* v. *Shanker* (23 N.Y. 2d 111) insofar as the right to a jury trial is concerned" (23 N.Y. 2d at p. 188, App. A to Jurisdictional Statement).

A

Appellants' Jurisdictional Statement included the following questions (pp. 3-4):

> "3. Whether Article 14 of the New York Civil Service Law unconstitutionally deprived the appellants of liberty and property without due process of law, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York against their will, without making any provision for payment of just compensation for such continued involuntary labor?
>
> "4. Whether the said statute unconstitutionally denied to the appellants the equal protection of the laws, by excluding them from the application of the State's labor relations laws, and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the Government, against their will?"

The record shows that the appellants raised the above-quoted Federal constitutional questions during the trial, as follows:

> "Mr. O'Dwyer: I have set forth, generally speaking,—by the way, your Honor, when I have not raised the constitutional question here with respect to the Taylor Act it is not because of the fact that I am waiving that, but merely because of the fact that I think in this instance here the people that are before you are not even alleged to be in violation.
>
> "The Court: I will dispose of that constitutional question for you in one minute. The language is the same as it was in the Condon-Wadlin Act and that was

held constitutional all the way up the line. So don't talk about the constitutionality." (76-77)

"Mr. O'Dwyer: It is our contention, from the inception, your Honor, and I have said it before, and I repeat it now at this time, that the Taylor Law never did apply to this situation, number one; and, secondly, that there is no basis in law for this order, and it is unconstitutional and contrary to the State and National Constitution." (111)

"Mr. O'Dwyer: I now deal with the motion insofar as DeLury is concerned, and I now, again, renew the motions made previously, upon all the grounds heretofore set forth; and on the further ground that the order issued herein was not by virtue of law, and that any law with regard to it is contrary to the provisions of the State and National Constitutions." (112)

"Mr. O'Dwyer: Your Honor, may I just make one more observation? I would like to preserve the record by incorporating here the objection to the statute as being unconstitutional as far as the State and National Constitution is concerned." (129)

The New York Court of Appeals considered and decided in this case that the Taylor Law prohibition of strikes by public employees does not deprive the appellants of due process of law (23 N.Y. 2d 175, 182-186; Appendix A, p. 2a), or of the equal protection of the laws (*id.*, pp. 187-188; Appendix A, p. 2a).

The New York Court of Appeals made an order in this case on December 11, 1968, that (Appendix A, p. 9a):

"the opinion of the Court clearly indicates that the constitutional arguments raised by the appellants were passed upon."

I

Where, as here, the record shows that the constitutional validity of a State statute was questioned, but that the particular grounds were not stated in the record, and the opinion of the highest State Court discussed certain grounds for questioning the constitutional validity of the statute and sustained its constitutional validity, this Court has jurisdiction to hear and to decide the question of the validity of such State statute which was considered in the opinion of the highest State Court. *Silver* v. *Silver,* 280 U.S. 117, 122; *Saltonstall* v. *Saltonstall,* 276 U.S. 260, 268. In the *Silver* case, *supra,* this Court said (280 U.S. at 122):

> "As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the Court below."

In this case, the record shows that the Trial Court prevented the appellants from stating the grounds for their questioning the constitutional validity of the statute, by deciding summarily, without allowing any argument, that the statute was constitutional, and by concluding its summary decision with the words, "So don't talk about the constitutionality" (77).

Appellee moved to dismiss the appeal herein:

> "On the ground that some of the questions presented were not raised in the courts below, and all of them are so unsubstantial as not to need further argument."

Appellee did not contend that all the questions presented had not been raised in the courts below, but only that the question as to whether appellants had a right to a jury trial in this prosecution for criminal contempt for non-compliance with an anti-strike injunction issued under the Taylor Law, and whether the appellants were denied procedural due process and equal protection of the laws during their trial for criminal contempt for non-compliance with such injunction were not so raised.

While appellee's motion also contended that "in the court of first instance" the appellants did not make the specific arguments that they made in their appellate briefs in the New York Courts questioning the constitutionality of the Taylor Law, this is immaterial because the New York Court of Appeals actually considered such arguments and wrote an opinion concluding that the Taylor Law did not deprive the appellants of due process of law or of the equal protection of the laws, and thereby those constitutional questions became available for review by this Court on this appeal. *Whitfield* v. *Ohio,* 297 U.S. 431, 435, 436.

B

The opinion of the New York Court of Appeals in this case also considered and decided that since appellants are employees of a municipality they have no right to a jury trial in this prosecution for criminal contempt for non-compliance with an anti-strike injunction order, issued under the Taylor Law (23 N.Y. 2d 175, 188; Appendix A. See, also: *Rankin* v. *Shanker,* 23 N.Y. 2d 111; Appendix B) even though every other class of employees has such a right by virtue of a New York statute. This, it would

seem, is a plain denial of equal protection under the decided cases discussed in the Jurisdictional Statement.

In these circumstances, this Court has jurisdiction to hear and to decide this constitutional question, even though it was not raised at the trial and was first raised on appeal to the Appellate Division of the New York Supreme Court, particularly since that question was obviously considered and rejected by the New York Court of Appeals.

In *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 185-186, the Court said:

> "Where it appears from the opinion of the State court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

C

The dismissal of the appeal herein "for want of a properly presented federal question", has left undecided important constitutional questions concerning the relations between State and local governments and their employees. Such questions need to be decided now.

We have not found any reported case in which this Court considered and decided the merits of appellants' contentions that the Taylor Law prohibition against strikes by public employees deprives such employees of due process

of law and of the equal protection of the laws and that a State, while according the right to trial by jury in labor-injunction cases generally, can deny that right solely to municipal employees whose duties are indistinguishable from those performed by private employees.

The dismissal of appellants' appeal by this Court has left undecided serious constitutional questions which are bound to arise again and again in the New York courts and in State courts throughout the land. The order of this Court has created widespread uncertainty among the vast multitude of civil servants. The oldest publication devoted to the interests of state and municipal employees expressed these circumstances in an editorial to which we respectfully call this Court's attention:

> "The U. S. Supreme Court's dismissal of a suit contesting the constitutionality of key provisions of the Taylor Law sheds little light on the subject.
>
> "In an unsigned opinion, the Court said simply that 'the appeal is dismissed for want of properly-presented Federal question,' whatever that means. Does it mean there is no Federal question involved, or does it mean there is a Federal question, which if properly presented, would be entertained by the court?
>
> "Although the chances may appear remote, a request by Mr. DeLury for reargument before the Supreme Court seems appropriate. As matters now stand, employees and their unions are uncertain as to the court's opinion on this vital question." (The Chief, April 16, 1969)

Conclusion

For the foregoing reasons it is respectfully urged that special leave be granted to the appellants to file this petition for rehearing of this cause after expiration of the 25-day period for filing thereof; that the petition for a rehearing be granted; and that, upon further consideration, the judgment of the Court of Appeals of the State of New York be reversed.

July, 1969.

Respectfully submitted,

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Certificate of Counsel

I, PAUL O'DWYER, counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ PAUL O'DWYER

PAUL O'DWYER
Counsel for Appellants